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# THE COMMITTEE ON ENERGY AND COMMERCE

## INTERNAL MEMORANDUM

May 23, 2011

To: Members, Committee on Energy and Commerce

From: Committee Staff

### **Mark-Up of H.R. 908, the Full Implementation of the Chemical Facility Anti-Terrorism Standards Act**

On Wednesday, May 25, 2011, the Committee on Energy and Commerce will mark up H.R. 908, a bill to extend the Chemical Facilities Anti-Terrorism (CFATS) program through September 30, 2017.

### **Legislative History of H.R. 908**

The CFATS program was authorized in Section 550 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109-295). Pursuant to Section 1650 of H.R. 1473, Department of Defense and Full-Year Continuing Appropriations Act, 2011 (now Public Law 112-10), the CFATS program's authority expires on October 4, 2011. Referred solely to the Committee on Energy & Commerce, H.R. 908, introduced by Representatives Tim Murphy (PA) and Gene Green (TX), extends the CFATS program until October 2017.

On March 31, 2011, the Subcommittee on Environment and the Economy held a legislative hearing on H.R. 908 receiving testimony from the Department of Homeland Security, the Society of Chemical Manufacturers and Affiliates, Hubbard-Hall, Inc., on behalf of the National Association of Chemical Distributors; Sherwin-Williams, on behalf of the American Coatings Association, and the United Steel Workers.

On May 4, 2011, the Subcommittee on Environment and the Economy favorably reported H.R. 908 by voice vote. The Subcommittee approved one amendment to H.R. 908, authorizing funding for CFATS at \$89.92 million for each year the program is authorized under the bill.

### **Section 550 of Public Law 109-295 (Section 550)**

Section 550 authorizes the Department of Homeland Security (DHS) to regulate facilities with chemicals for anti-terrorism security purposes. Section 550 requires the Secretary of Homeland Security to issue interim final regulations establishing risk-based performance standards for chemical facility security; development of vulnerability assessments; and development and implementation of site security plans.

Under Section 550, DHS must review and approve required assessment plans and implementation for each facility, but may not disapprove a site security plan for any reason other than lack of compliance. In addition, DHS may approve vulnerability assessments and site security plans created through security programs not developed by DHS, so long as these programs meet the performance standards established in regulation.

Section 550 protects from public disclosure information developed for compliance with these DHS regulations but allows information to be shared with state and local government officials possessing necessary security clearances. Shared information, including vulnerability information provided to DHS, may not be publicly disclosed, regardless of state or local laws, and is exempt from the Freedom of Information Act (FOIA), and must be treated as classified information in all judicial and administrative proceedings. Unauthorized disclosure is punishable by fine.

The Consolidated Appropriations Act of 2008 ([P.L. 110-161](#)) later amended Section 550 to clarify a state or local government's right to promulgate chemical facility security regulations so long as there is not an "actual conflict" between the federal and state or local regulation.

### **Department of Homeland Security Regulations Implementing Section 550**

The Department of Homeland Security issued an "interim final rule" regarding chemical facility security in April 2007 that implements Section 550.

Under the rule chemical facilities with greater than specified quantities of 322<sup>1</sup> potentially dangerous chemicals must perform a "top screen" (i.e., assessment of potential facility vulnerabilities) and submit information to DHS so that DHS can determine if a facility's risk status is high enough to merit further coverage under CFATS. High-risk facilities are then categorized into four risk-based tiers. DHS established different performance-based requirements for facilities assigned to each risk-based tier with high-risk facilities engendering additional responsibilities, including (1) vulnerability assessment development, (2) site security plan formation and submittal, and (3) required implementation of the security plan. DHS requires the vulnerability assessment to include asset characterization, threat assessment, security vulnerability analysis, risk assessment, and countermeasures analysis. Facilities in one of the four high-risk categories must more fully assess their vulnerabilities, develop an effective site security plan, submit these documents to DHS, and implement their security plans.

High-risk facilities may develop vulnerability assessments and site security plans using alternative security programs so long as they meet the tiered, performance-based requirements of the interim final rule. The Secretary may disapprove submitted vulnerability assessments or site security plans that fail to meet DHS standards but not on the basis of the presence or absence of a specific measure. As of March 2011, almost 40,000 chemical facilities had registered with DHS

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<sup>1</sup> [http://www.crs.gov/pages/Reports.aspx?PRODCODE=R40695&Source=search#\\_Toc280875211](http://www.crs.gov/pages/Reports.aspx?PRODCODE=R40695&Source=search#_Toc280875211)

and completed the Top-Screen process. Of these DHS required more than 8,000 to submit a site vulnerability assessment.

The information generated under this interim final rule and information developed for chemical facility security purposes that DHS determines needs to be protected, will be designated "Chemical-terrorism Vulnerability Information" (CVI), a new category of security-related information.

The interim final rule also establishes penalties for lack of compliance and the disclosure of CVI information. DHS may order facility closure after other penalties, such as fines, have been levied.

### **Amendments at Full Committee**

Information on proposed amendments of which the Committee is aware will be made available as soon as is practicable. In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to: [mike.bloomquist@mail.house.gov](mailto:mike.bloomquist@mail.house.gov). Any information with respect to an amendment's parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

If you have any questions, please contact David McCarthy or Jerry Couri with the Committee Majority staff at 5-2927.